

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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Mario Herrada-Gonzalez,

Petitioner,

v.

W.A. Gittere, *et al.*,

Respondents.

Case No. 2:20-cv-01013-GMN-DJA

**Order Granting Leave to Amend
Petition and Denying Motion to
Dismiss without Prejudice**

(ECF Nos. 82, 76)

Respondents filed a Motion to Dismiss Petitioner Mario Herrada-Gonzalez's 28 U.S.C. § 2254 Second Amended Habeas Petition. (ECF No. 76.) The Petition challenges Herrada-Gonzalez's murder conviction, arguing trial court error, ineffective assistance of counsel, and that the evidence was insufficient. (ECF No. 23.) After the Motion to Dismiss was filed, Herrada-Gonzalez filed a Motion for Leave to File a Third Amended Petition. (ECF No. 82.) As discussed below, the Court grants the Motion to Amend and denies the Motion to Dismiss without prejudice.

I. Background

In July 2010, a Clark County, Nevada jury convicted Herrada-Gonzalez of First-Degree Murder with Use of a Deadly Weapon and Robbery with Use of a Deadly Weapon and acquitted him of Conspiracy to Commit Murder and Conspiracy to Commit Robbery. (Exh. 61.)¹ The charges in the case come from the killing of Melchor Bravo at

¹ Exhibits referenced in this order are exhibits to Respondents' first Motion to Dismiss, ECF No. 29, and are found at ECF Nos. 30-38.

1 a Las Vegas casino. (See ECF No. 23 at 2.) Herrada-Gonzalez had had a falling out
2 with Bravo and alleged that he had gone to the casino with two associates to confront
3 Bravo. One of the three men shot Bravo. The state district court sentenced him to
4 terms that amounted to 26 years to life.² (Exh. 71.) Judgment of Conviction was
5 entered on December 22, 2010. (Exh. 72.)

6 The Nevada Supreme Court affirmed Herrada-Gonzalez's convictions in part and
7 reversed in part. (Exh. 108.) The court held that the State had introduced insufficient
8 evidence to support the robbery conviction, so Herrada-Gonzalez was not guilty of
9 murder under the felony-murder rule. (*Id.* at 3-4.) The court further held that sufficient
10 evidence supported the conviction of first-degree murder under the lying-in-wait theory,
11 and therefore, it affirmed the first-degree murder conviction. (*Id.* at 4-5.) An Amended
12 Judgment of Conviction was entered on May 11, 2015. (Exh. 131.) Herrada-Gonzalez
13 was re-sentenced on the murder count only to 20 to 50 years, with a consecutive 48 to
14 180 months for the deadly weapon enhancement. The Nevada Supreme Court affirmed
15 the denial of Herrada-Gonzalez's state court habeas petition. (Exh. 172.)

16 Herrada-Gonzalez dispatched his federal petition for mailing in June 2020. (ECF
17 No. 5.) The Court granted his Motion for Counsel and Herrada-Gonzalez, through his
18 counsel the Federal Public Defender, filed a protective First Amended Petition in July
19 2020. (ECF No. 13.) He then filed a Second Amended Petition in February 2021. (ECF
20 No. 23.) In December 2022, Herrada-Gonzalez filed a Motion for Stay; Respondents
21 indicated that they did not oppose. (ECF No. 69, 70.) The Court granted the motion and
22 stayed the case while Herrada-Gonzalez returned to state court. Herrada-Gonzalez
23 moved to reopen the case, and the Court granted the motion in October 2024.

24 Respondents then filed a Motion to Dismiss the Second Amended Petition. (ECF
25 No. 76.) Before filing a response to the Motion to Dismiss, Herrada-Gonzalez has filed

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27 ² The court sentenced Herrada-Gonzalez to 20 years to life for the murder count, 72 to 240 months
28 consecutive for the weapon enhancement, 48 to 120 months for the robbery count, with a
consecutive 48 to 120 months for the weapon enhancement. The court ran the robbery count
concurrent to the murder count.

1 a Motion for Leave to File a Third Amended Petition. (ECF No. 82.) Respondents
2 opposed, and Herrada-Gonzalez replied. (ECF Nos. 84, 86.)

3 II. Motion for Leave to File Third Amended Petition

4 Under Federal Rule of Civil Procedure 15(a)(2), a party may amend a pleading
5 with the court's leave. "The court should freely give leave when justice so requires."
6 Fed. R. Civ. P. 15(a)(2). "Rule 15's policy of favoring amendments to pleadings should
7 be applied with extreme liberality." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.
8 1981) (internal quotations omitted). Although leave to amend is within the discretion of
9 the district court, the decision "should be guided by the underlying purpose of Rule
10 15(a) . . . which was to facilitate decisions on the merits, rather than on technicalities or
11 pleadings." *In re Morris*, 363 F.3d 891, 894 (9th Cir. 2004) (internal quotations omitted).
12 When deciding whether to grant leave, a court may "take into consideration such factors
13 as bad faith, undue delay, prejudice to the opposing party, futility of the amendment,
14 and whether the party has previously amended his pleadings." *Id.* Futility of
15 amendment can alone justify denying a motion for leave to amend. *Bonin v. Calderon*,
16 59 F.3d 815, 845 (9th Cir. 1995).

17 Here, Herrada-Gonzalez seeks to abandon one claim in the Second Amended
18 Petition and to add two claims. (ECF No. 82.) The proposed Third Amended Petition
19 sets forth four grounds for relief:

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21 Ground 1: Trial counsel was ineffective in violation of Herrada-Gonzalez's
Fifth, Sixth, and Fourteenth Amendment rights by:

- 22 (A) advising him to reject a favorable plea offer without explanation; and
23 (B) failing to request a special verdict form.

24 Ground 2: The State presented insufficient evidence to convict Herrada-
25 Gonzalez under either the lying-in-wait theory or premeditation theory of
26 first-degree murder, in violation of his Fifth, Sixth, and Fourteenth
Amendment rights.

27 Ground 3: The trial court failed to adequately instruct jurors on elements of
28 lying-in-wait first-degree murder, in violation of Herrada-Gonzalez's Fifth,
Sixth, and Fourteenth Amendment rights.

1 Ground 4: Herrada-Gonzalez's rights were violated when the trial court
2 failed to declare a mistrial following numerous instances of prosecutorial
3 misconduct during closing arguments, in violation of Herrada-Gonzalez's
Fifth, Sixth, and Fourteenth Amendment rights.

4 (ECF No. 82-1.)

5 Herrada-Gonzalez seeks to add grounds 3 and 4. He argues that because the
6 claims were both raised and exhausted on direct appeal and that they relate back to a
7 timely filed petition he has good cause to amend, and amendment is not futile.

8 Respondents assert that Herrada-Gonzalez seeks leave after undue delay and
9 that the delay prejudices Respondents because they will likely have to draft a new
10 Motion to Dismiss to address the new claims. (ECF No. 84.) They argue that
11 amendment would be futile because the proposed amended petition fails to cure
12 unexhausted claims that Herrada-Gonzalez raised in his Second Amended Petition.
13 They also argue that Herrada-Gonzalez fails to articulate how justice requires
14 amendment.

15 The Court notes that it would have been more expedient and efficient if Herrada-
16 Gonzalez had sought leave to file an amended petition when he returned to this Court
17 and moved to lift the stay. And Herrada-Gonzalez has not explained the reason for the
18 delay in including these claims to the Court's satisfaction. However, he is correct that
19 controlling federal law has changed or been clarified during the litigation of his federal
20 petition. This Court had granted discovery before the United States Supreme Court
21 decided *Shinn v. Ramirez*, 596 U.S. 366 (2022), and held that procedurally defaulted
22 claims based upon new evidence could not be considered by a federal court if not
23 previously presented in state court proceedings and where the failure to previously
24 present that evidence was attributable to the negligence of initial state post-conviction
25 counsel. In light of *Shinn*, Herrada-Gonzalez moved to stay the federal action in order
26 to give the state courts an opportunity to consider newly developed evidence related to
27 his plea negotiations. The Nevada Supreme Court ultimately refused to consider this
28 evidence or the merits of the new ineffective assistance claim based upon application of

1 state procedural bars. (See Pet. Exh. 37, ECF No. 74-8.) Then the Ninth Circuit Court
2 of Appeals held in *McLaughlin v. Oliver*, 95 F.4th 1239 (9th Cir. 2024), that new
3 evidence presented but not considered on the merits by state courts in a successive
4 postconviction petition cannot be considered to support otherwise procedurally
5 defaulted claims in federal habeas. Counsel for Herrada-Gonzalez represents that after
6 discussing the current procedural posture of this case with Petitioner, she moved to
7 amend in order to add back in the two claims, which had been included in the First
8 Amended Petition. Herrada-Gonzalez asserts that these two claims were exhausted on
9 direct appeal and relate back to a timely filed petition. The Court concludes that justice
10 is best served by granting the Motion for Leave to Amend and denying Respondents'
11 Motion to Dismiss without prejudice. Respondents can then draft a renewed Motion to
12 Dismiss that includes any procedural defenses that they wish to raise as to the two
13 additional claims.

14 III. Conclusion

15 IT IS THEREFORE ORDERED that Petitioner's Motion for Leave to File a Third
16 Amended Petition (**ECF No. 82**) is **GRANTED**. The Clerk of Court is directed to detach
17 and file the proposed Third Amended Petition (ECF No. 82-1.)

18 IT IS FURTHER ORDERED that Respondents' Motion to Dismiss (**ECF No. 76**) is
19 **DENIED** without prejudice.

20 IT IS FURTHER ORDERED that Respondents file a response to the Petition,
21 including potentially by motion to dismiss, within **60 days** of service of the Petition, with
22 any requests for relief by Petitioner by motion otherwise being subject to the normal
23 briefing schedule under the local rules. Any response filed is to comply with the
24 remaining provisions below, which are entered pursuant to Habeas Rule 5.

25 IT IS FURTHER ORDERED that any procedural defenses raised by
26 Respondents in this case be raised together in a single consolidated motion to dismiss.
27 In other words, the Court does not wish to address any procedural defenses raised
28 herein either in seriatum fashion in multiple successive motions to dismiss or embedded

1 in the answer. Procedural defenses omitted from such motion to dismiss will be subject
2 to potential waiver. Respondents should not file a response in this case that
3 consolidates their procedural defenses, if any, with their response on the merits, except
4 pursuant to 28 U.S.C. § 2254(b)(2) as to any unexhausted claims clearly lacking merit.
5 If Respondents do seek dismissal of unexhausted claims under § 2254(b)(2): (a) they
6 will do so within the single motion to dismiss not in the answer; and (b) they will
7 specifically direct their argument to the standard for dismissal under § 2254(b)(2) set
8 forth in *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005). In short, no procedural
9 defenses, including exhaustion, should be included with the merits in an answer. All
10 procedural defenses, including exhaustion, instead must be raised by motion to dismiss.

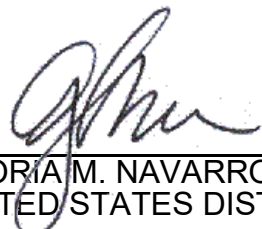
11 IT IS FURTHER ORDERED that, in any answer filed on the merits, Respondents
12 specifically cite to and address the applicable state court written decision and state
13 court record materials, if any, regarding each claim within the response as to that claim.

14 IT IS FURTHER ORDERED that Petitioner has **45 days** from service of the
15 answer, motion to dismiss, or other response to file a reply or opposition, with any other
16 requests for relief by Respondents by motion otherwise being subject to the normal
17 briefing schedule under the local rules.

1 IT IS FURTHER ORDERED that any additional state court record exhibits filed
2 herein by either Petitioner or Respondents be filed with a separate index of exhibits
3 identifying the exhibits by number. The parties will identify filed CM/ECF attachments
4 by the number of the exhibit in the attachment. Each exhibit must be filed as a separate
5 attachment.

6 IT IS FURTHER ORDERED that, at this time, the parties send courtesy copies of
7 any responsive pleading or motion and all indices of exhibits only to the Reno Division
8 of this Court. Courtesy copies must be mailed to the Clerk of Court, 400 S. Virginia St.,
9 Reno, NV, 89501, and directed to the attention of "Staff Attorney" on the outside of the
10 mailing address label. No further courtesy copies are required unless and until
11 requested by the Court.

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14 DATED: 9 June 2025.

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18 GLORIA M. NAVARRO
19 UNITED STATES DISTRICT JUDGE
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